

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL JARROD JACKSON,

Defendant-Appellant.

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UNPUBLISHED

December 19, 2019

No. 346739

Wayne Circuit Court

LC No. 18-004806-01-FH

Before: MURRAY, C.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of felonious assault, MCL 750.82, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and assault and battery, MCL 750.81. Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 1½ to 15 years’ imprisonment for felonious assault, two years’ imprisonment for felony-firearm, and 90 days for assault and battery. We affirm.

**I. FACTUAL BACKGROUND**

This case arises from the May 25, 2018 assault of Shawn Hartman. Around 1:00 a.m., Hartman drove his car to the Marathon gas station, located at 25875 West Outer Drive, in Detroit. As Hartman stood beside his car pumping gas, defendant approached Hartman, and attempted to sell him crack cocaine. Defendant became upset when Hartman did not want to buy any crack cocaine, and defendant started to yell, and slapped Hartman across the face. Hartman fought back. While the two were fighting, Hartman saw defendant holding a “smaller to mid-size pistol, semiautomatic pistol” above Hartman’s head. Hartman attempted to block defendant from striking him with the gun, but was hit with it along his hairline. Eventually Hartman knocked the gun out of defendant’s hand and onto the ground, and the gun fell between Hartman’s car and the gas pump. Hartman attempted to grab the gun, but tripped over the gas hose, and fell to the ground. Defendant dove onto Hartman reaching for the gun, but Hartman got ahold of the gun first.

As Hartman attempted to stand up, defendant grabbed onto Hartman’s neck, and was hanging on Hartman’s back, choking him. Hartman reached behind his back with the gun, aimed

it at defendant, and shot. The shot missed defendant, but hit Hartman's car gas tank cover. The gun then jammed. Defendant then began to bite the left side of Hartman's face, and the gun started to slip from Hartman's grip. Defendant eventually pulled the gun from Hartman's hands. Hartman then ran into the store and, as he ran, he looked back and saw that defendant was aiming the gun at him, and was attempting to shoot. Defendant biked away once the police arrived at the gas station. Hartman took a photograph of the scratches on his car where the bullet had grazed it.

## II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence presented to support his felony-firearm conviction. Specifically, defendant argues that the prosecution failed to prove, beyond a reasonable doubt, that defendant "brought the hand gun to the altercation."

This Court reviews a challenge to the sufficiency of the evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). To determine whether there was sufficient evidence presented to support a conviction, this Court considers whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). This standard of review is deferential, and the evidence is to be viewed in the light most favorable to the prosecution. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Furthermore, circumstantial evidence and all reasonable inferences drawn therefrom can constitute sufficient proof of the elements of a crime. *Id.*

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Muhammad*, 326 Mich App 40, 61; 931 NW2d 20 (2018) (quotation marks and citation omitted). See also MCL 750.227b. Possession can be established through direct or circumstantial evidence, and is a factual question for the fact-finder. *People v Flick*, 487 Mich 1, 14; 790 NW2d 295 (2010), citing *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). Additionally, a firearm is a weapon " 'that is designed or intended to propel a dangerous projectile.' " *People v Humphrey*, 312 Mich App 309, 316; 877 NW2d 770 (2015), quoting *People v Peals*, 476 Mich 636, 642; 720 NW2d 196 (2006).

More than sufficient evidence was presented to establish defendant's guilt beyond a reasonable doubt. As noted, Hartman testified and reported to Detroit Police Officer Tracy Moreno on the night of the assault that while he and defendant were fighting, he saw defendant holding a gun above his head. Hartman was then hit with this gun and had a bruise, along his hairline, the next day. Hartman described the gun as a "smaller to mid-size pistol, semi-automatic pistol." The trial court found that the gas station security camera footage corroborated Hartman's testimony that he and defendant were fighting in close proximity. Additionally, both Hartman and Officer Moreno testified that a bullet was fired from the gun, demonstrating that the gun was real. Thus, while the prosecution may not have proven that defendant "brought the hand gun to the altercation," the prosecution's only burden was simply to demonstrate that defendant possessed a firearm during the commission or attempted commission of a felony. *Muhammad*, 326 Mich App at 61. Defendant does not challenge his conviction of felonious assault.

Defendant's also argues that insufficient evidence was presented to support his conviction of felony-firearm because no weapon was found at the scene. Defendant fails to provide this Court with support for his assertion that a weapon must be found, and we are aware of no such authority.<sup>1</sup>

### III. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, defendant argues that he was denied the right to the effective assistance of counsel.

To preserve an argument of ineffective assistance of counsel for appellate review, a defendant must move the trial court for a new trial or for a *Ginther*<sup>2</sup> hearing. *People v Lopez*, 305 Mich App 686, 693; 854 NW2d 205 (2014). Failure to move for a new trial or for a *Ginther* hearing—as defendant failed to do here—limits this Court's review to mistakes that are apparent in the appellate record. *People v Foster*, 319 Mich App 365, 390; 901 NW2d 127 (2017). “If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue.” *Id.* (quotation marks and citation omitted).

Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019). This Court reviews questions of law de novo, and a trial court's findings of fact for clear error. *Id.* “Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made.” *People v Anderson*, 284 Mich App 11, 13; 772 NW2d 792 (2009) (quotation marks and citation omitted).

To establish the ineffective assistance of counsel, a defendant must establish that “(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different.” *People v Rosa*, 322 Mich App 726, 741; 913 NW2d 392 (2018), quoting *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). “The defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.” *People v Heft*, 299 Mich App 69, 81; 829 NW2d 266 (2012). Effective assistance of counsel is presumed, and defendant bears the burden to overcome the strong presumption that the assistance of his counsel was sound trial strategy. *Rosa*, 322 Mich App at 741. Moreover, it is well established that this Court will not second-guess counsel's decisions regarding trial strategy, and will not assess counsel's competence with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

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<sup>1</sup>Hartman's testimony, and the reasonable inferences therefrom, constitute sufficient evidence to support defendant's felony-firearm conviction.

<sup>2</sup>*People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

We reject defendant's contention that his trial counsel's failure to object to the admission of photographic evidence depicting the bullet scratch marks on Hartman's car constitutes ineffective assistance of counsel. Defendant argues that trial counsel should have objected to their admission because the prosecution did not produce them until the day of trial. Additionally, defendant asserts that trial counsel should have objected to their admission because the photographs were not taken by the police, but "were apparently taken by the alleged victim at some point weeks after the alleged incident," and could have been prior damage to the car. Defendant claims that he was prejudiced by the late disclosure of the photographs and trial counsel's failure to object to their admission because he was denied the opportunity to investigate the source of the scratches depicted in the photographs.

The existing record does not support defendant's claim that the photographs were only made known to his trial counsel the day of trial. The existing record also does not support defendant's claim that the source of the scratches may be anything other than from the bullet, or that the photographs were taken by defendant at some point weeks after the incident. Rather, Hartman testified that the scratches were caused by the bullet, and Officer Moreno testified that she saw the scratches when she responded to the incident. Defendant failed to support these claims with any offers of proof or affidavits. Therefore, defendant failed to overcome the presumption that his trial counsel was acting according to trial strategy when he did not object to the admission of the photographs.

We likewise reject defendant's argument that his trial counsel should have consulted with "Forensic Experts" to determine the source of the scratches on Hartman's car, and should have consulted and called a "Sound Expert" to opine whether the alleged gunshot-like sound heard in the security camera footage played during trial was, in fact, a gunshot.

"An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). The failure to call or consult with a witness only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *Id.* Defendant has failed to support this argument with any evidence of the substance of his proposed expert's testimony, or how any testimony would benefit him. Defendant merely speculates that a forensic expert may have opined that the scratches on Hartman's car were prior damage, and that the sound expert may have opined that the gunshot-like noise heard in the security camera footage may have simply been a "car back firing."

Defendant has also not demonstrated how the failure to call such witnesses denied him a substantial defense. A defendant is denied a substantial defense if he can demonstrate that, but for trial counsel's errors, there is a reasonable probability that the proceeding would have resulted differently. *People v Cooper*, 309 Mich App 74, 80; 867 NW2d 452 (2015). Defendant has not offered any proof that the testimony of these proposed experts would have benefited him, or would have altered the result of the trial. Therefore, based on the existing record, defendant has not overcome the presumption that he received the effective assistance of counsel. See *Payne*, 285 Mich App at 190.

Finally, defendant's trial counsel was not ineffective by failing to file a motion to quash the information with regard to the felony-firearm charge. Defendant argues that there was

insufficient evidence to support the claim that he possessed a firearm during the assault because the only evidence presented that he possessed a gun was Hartman's testimony. And, defendant argues, Hartman should not have been found credible because Hartman described the gun as a semi-automatic pistol. A semi-automatic pistol, however, ejects a shell casing every time that it is fired, and no shell casing was recovered from the scene.

"Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). Moreover, the decision to file a pretrial motion is a matter of trial strategy. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). A motion to quash the information would have been futile. After hearing Hartman's testimony, the district court found that the prosecution met its burden of proving probable cause with regard to the felony-firearm charge, and bound defendant over to the circuit court. The trial court then found that there was sufficient evidence to convict defendant beyond a reasonable doubt. Therefore, defense counsel was not ineffective for failing to advance a frivolous motion because the district court found that sufficient evidence existed at the preliminary examination to support a bind over. See *People v Fonville*, 291 Mich App 363, 383-384; 804 NW2d 878 (2011) (the defendant's counsel was not ineffective for failing to move to quash the information because the district court found that there was sufficient evidence presented to support a bindover). Therefore, while trial counsel's strategy may not have been successful, defendant has failed to overcome the presumption that trial counsel's performance was the result of sound trial strategy.<sup>3</sup>

Affirmed.

/s/ Christopher M. Murray  
/s/ David H. Sawyer  
/s/ Elizabeth L. Gleicher

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<sup>3</sup> Defendant also requests that this Court remand his case for a *Ginther* hearing. MCR 7.211(C)(1)(a) requires that a motion for remand "must be supported by affidavit or offer of proof regarding the facts to be established at a hearing." As we have already explained, defendant has not made an offer of proof of the facts to be established on remand. Defendant merely asserts that he is entitled to a remand "to expand the record and determine if counsel had any strategic reason for their action." Defendant is not entitled to a remand.